**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 9**

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| **MIKE-SELLS' POTATO CHIP CO.** | : | |
| **Respondent,** | : | **CASE NO. 09-CA-184215** |
| **and** | : | |
| **TEAMSTERS LOCAL UNION No. 957, affiliated with the International Brotherhood of Teamsters,** | : | **Administrative Law Judge Andrew S. Gollin** |
| **Charging Party.** | : | |

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## TEAMSTERS LOCAL UNION NO. 957's BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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## I. INTRODUCTION

This case came before Administrative Law Judge Andrew S. Gollin on May 31, June 1 and 2, 2017 upon the General Counsel's Complaint alleging that Mike-Sell's Potato Chip Company (hereinafter sometimes referred to as "Respondent" or "Employer") failed and refused to bargain with and provide relevant information to Teamsters Local Union No. 957 (hereinafter sometimes referred to as "Union" or "Charging Party") in violation of Sections 8(a)(1) and 8(a)(5) of the Act over the elimination of delivery routes for Respondent's products. Respondent made unilateral changes to unit employees' terms and conditions of employment by further entering into contracts for owner operator equipment. Local 957 respectfully submits that the

record evidence and applicable case law supports the allegations in the Complaint that Respondent violated Sections 8(a)(1) and 8(a)(5) of the Act.

## II. FACTS

Respondent is engaged in the manufacture, sale and distribution of potato chips throughout the southwest Ohio and Indiana areas. The bargaining unit at the Respondent in this dispute is made up of route sales drivers (hereafter "RSDs") and over the road drivers and has been represented by Charging Party for many years. The parties' last negotiated collective bargaining agreement was effective from November 17, 2008 to November 17, 2012. (JX 1)[1] During negotiations for a successor agreement, Respondent prematurely declared impasse and unlawfully implemented its final offer, which are the subject of unfair labor practice charges and a compliance hearing in Case No. 09-CA-094143.

RSDs are responsible for reporting to the distribution center, loading product onto their trucks, and servicing the customers on their respective routes. These customers may include bars, gas stations, or larger retail outlets like Kroger and Meijer. (T. 997; 1055) The work of an RSD includes preparing customer orders, moving product onto shelves and maintaining or acquiring new displays. (T. 70-71) After RSDs completes their routes, they return their truck to the distribution center, prepare orders for next day, load their truck and then settle accounts from that day. RSDs use handheld computers provided by Respondent to prepare orders and provide receipts to their customers. (T. 71) Each driver can determine the order in which customers within their route will be serviced on a particular day.

On or about April 27, 2016, Respondent sent a letter to Charging Party indicating its intent to eliminate "up to three Dayton sales routes" in favor of selling the work to "independent

[1] Hereafter, joint exhibits will be referred to as JX __, exhibits submitted by General Counsel as GC EX __, exhibits from Respondent RX __ and exhibits from Charging Party will be referenced as CP EX __.

distributors." (JX 2) The letter invited employees to "inquire about this business opportunity and express an interest in becoming an independent distributor." Phil Kazer, VP of Sales and Marketing for Respondent, submitted a letter to Union Business Agent Alan Weeks also dated April 27 stating that Respondent was "seriously considering the elimination of three Dayton sales routes to be sold to independent distributors." (JX 3) The letter continued by stating that a "final decision" would be made on the route eliminations "within 3-6 months." (Id.)

Local 957 files a grievance over the sale of three routes

On May 6, 2016, Charging Party Steward Rich Vance, an RSD who has worked for Respondent for almost 19 years, filed a class grievance over the sale of the three routes. (T. 69; JX 4) The grievance alleges a violation of multiple provisions of the expired collective bargaining agreement. Mr. Vance submitted the grievance at step one to Route Supervisor Mike Poppas, who denied the grievance. (T. 75) Mr. Vance raised the grievance to Zone Manager Dennis Franklin at step two, who also denied the grievance. (T. 76) Mr. Vance contacted Mr. Weeks to schedule a third step grievance meeting. On or about June 12, 2016 at Respondent's facilities in Dayton, a third step meeting was held at which time Respondent again denied the grievance. As it had with every other grievance file after the expiration of the 2008-2012 collective bargaining agreement, Respondent refused to arbitrate the May 6, 2016 grievance filed by Mr. Vance.

Beth Meeker, HR Manager for Respondent, sent a letter to Mr. Weeks dated July 11, 2016 indicating that Respondent would be "selling Route # 102, Xenia territory, effective 7/24, 2016." (JX 5) Mr. Vance did not file an additional grievance when Route 102 was sold because the initial grievance "would have covered that." (T. 82) In late August, Mr. Vance became aware Respondent was selling two more routes: Route 104 and Route 122. (T. 83) The elimination of

these routes displaced bargaining unit employees Gerald Schimer and Jerry Lake. (JX 6) Both routes covered suburbs of Dayton and were serviced from the Dayton Distribution Center; Route 104 included Kettering, Bellbrook, and Centerville while 122 included Beavercreek and Kettering. (T. 83) Mr. Vance filed an additional grievance over the sale of these routes on or about August 29, 2016. (T. 84; JX 7) Respondent denied this grievance at steps one and two. (GC EX 3; GC EX 4)

Local 957 Requests Information for Evaluating Grievances

By letter dated August 31, 2016 addressed to Beth Meeker, HR Manager for Respondent, Charging Party requested relevant and necessary information from Respondent:

> 1. All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so a comparison can be made as to the profitability of all of the routes to Route No. 104 and Route No. 122.
> 2. A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold.
> 3. A description of how Mike-Sell's product is to be received by the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold.
> 4. A copy of all correspondence, including electronic correspondence, between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016.

(JX 8) The August 31, 2016 letter disputes Respondent's characterization of the Paolucci award, noting that his award was supported by several considerations including the outlying location of the route in question as well as its lack of profitability. This letter (JX 8) further notes that Routes 104 and 122 operate out of the Dayton service area and no information was provided to Charging Party indicating that the routes were not profitable for Respondent.

Respondent replied by letter dated September 12, 2016 to Mr. Weeks indicating its intent to not furnish the information requested, taking the position that Arbitrator Paolucci's award absolved it of its obligation to bargain the decision to sell. (JX 9) The September 12, 2016 letter

set forth Respondent's position that management rights afforded it the ability to unilaterally "sell" the routes without bargaining. Arbitrator Paolucci's award was issued prior to the expiration of the parties' most recent collective bargaining agreement. (RX 2) The arbitrator relied on Respondent's arguments that the Marion, Ohio route at issue there was "a remote area" of the Columbus Distribution Center territory. (RX 2, p. 9) Indeed, Respondent refers to "outlying" routes at least eighteen times in its brief to the arbitrator. (CP EX 1)

On September 12, Respondent also sent another letter to Charging Party stating it was selling Route 131 effective September 17, 2016. (JX 10) This letter (JX 10) indicates Respondent's position that it could do so "in accordance with our rights as recognized by Arbitrator Paolucci[…]" (JX 10) Mr. Vance filed an additional grievance dated September 12, citing several provisions of the expired collective bargaining agreement. (JX 11) This grievance was denied at steps one and two. (T. 91-92; 96; GC EX 5; GC EX 6) A third step grievance meeting was held in January 2017 where it was again denied. Respondent again took the position that it was not required to arbitrate Union grievances.

The use of "independent contractors"

The day after the parties' collective bargaining agreement expired, Respondent entered into an "Independent Distributor Agreement" with Keystone Distributing, Ltd. to service 29 routes that were previously serviced by bargaining unit employees. (RX 5; T. 304) When Buckeye/Keystone filed for bankruptcy in 2014, the routes reverted back to Respondent pursuant to its agreement with Buckeye/Keystone. Respondent reached an agreement with Snyder Lance to service the entire area previously serviced by Buckeye/Keystone, including the Cincinnati, Sabina and Columbus routes. (RX 9; T. 358) Snyder Lance paid nothing for the 29 routes that

they serviced. There was no evidence that Charging Party was made aware of the route reversion from Buckeye/Keystone to Respondent or the subsequent Snyder Lance agreement.

Respondent next contracted with Eric Gaudio d/b/a Earl Gaudio & Son, Inc. ("Gaudio") on or about April 22, 2013 to operate five routes in the Greenville, Ohio area. (RX 6) Mr. Kazer testified that the sale became effective June 1, 2013. (T. 317) Mr. Kazer claimed that Respondent verbally advised the Union at a bargaining session on April 24, 2013 that Respondent was eliminating these routes. (T. 319) Gaudio ran these routes for one month before its parent company filed for bankruptcy and the routes reverted back to Respondent by agreement. (T. 326-27) Mr. Kazer believed he heard Mr. Vance mention Gaudio's bankruptcy, but Respondent never sent notice to Charging Party regarding the reversion of the Greenville routes back to Respondent. (T. 329-30)

Respondent then contracted with Helm Distributing to operate the five Greenville routes, which Mr. Kazer testified Helm took over "literally one month later" in July 2013. No notice was ever sent to the Union regarding the Respondent's transaction with Helm Distributing. ("Helm") (T. 331-32) Respondent next contracted with Helm to service four routes in Springfield, Ohio in August 2013. According to the signed agreement Helm became the contracted distributor effective August 18, 2013. (RX 7) The Union and Respondent met to discuss severance and/or bumping rights for those displaced by the Springfield transaction. Explaining how the severance and bumping occurred, Mr. Kazer testified "In the Greenville situation, we allowed one of five of the salespeople to bump in (to the Dayton facility). The others, we just paid a severance to, because I didn't want them continuing employment." (T. 345)

In late 2015 Helm advised Respondent it was "liquidating their business," at which time pursuant to their agreement, the routes reverted back to Respondent. (T. 348-49) Respondent

then contracted with Charles Morris d/b/a Big TMT Enterprize, LLC ("Big TMT") to take over distribution of the Springfield and Greenville routes. (RX 1; T. 351-52) Respondent did not provide notice to Charging Party of the transaction between Respondent and Big TMT. (T. 355-56) Prior to securing other storage space, Mr. Morris worked out of Respondent's Dayton Distribution Center for a short period of time. (T. 357)

Respondent considered the financial "favorability" of particular routes around the time it was soliciting "independent contractors" for the four routes at issue. At the time of determining whether to "sell" Dayton routes, Respondent considered factors like whether a $5,000 or a $6,000 route would cause current RSDs to become "interested" in such an arrangement. (GC EX 1; T. 713-15) Based on the April 27, 2016 letter Lisa Krupp met with Mr. Kazer about becoming an "independent contractor" for Respondent. Ms. Krupp completed an "application" document that indicated no prior business experience. (RX 22, p. 4) Mr. Kazer testified that Ms. Krupp "completed verbally" that section. (T. 797) Ms. Krupp listed no information under "Source of Income" or "Banking Relationships." (RX 22, p. 6)

Respondent did not complete a credit check for Ms. Krupp. (T. 793) Notwithstanding the failure to complete a credit check, Respondent offered financing to Ms. Krupp for the purchase of two routes and one truck to service the routes and executed a promissory note. (RX 19; T. 960) Ms. Krupp did not independently seek separate financing quotes for the purchase. (T. 961) She purchased a truck from Respondent to service the routes in part because "the way it's set up, it's so much easier to work. I already know it." (T. 961)

When she discussed the matter with Respondent, she had two routes in mind she wanted: Jerry Lake's and Gerald Shimmer's routes. (T. 993-95) She was familiar with the profitability of these routes from running them as a vacation relief driver. Respondent found it perfectly

acceptable to contract its successful, high-commissioned routes and displace bargaining unit employees with nearly 22 years of seniority rather than contract less-profitable routes. (T. 186, 190-92)

Ms. Krupp testified that several aspects of her work as an RSD and her work as an "independent contractor" did not change. Ms. Krupp worked as a vacation relief or swing driver as a bargaining unit employee for Respondent primarily on routes serviced by the Springfield Distribution Center until Respondent sold all of the Springfield routes to Helm in the spring of 2016 and closed the Springfield Distribution Center. (T. 946) Ms. Krupp was one of the employees who was not offered work at the Dayton facility when the Springfield routes were closed and she received the negotiated severance payment. Ms. Krupp was later rehired by Respondent as a new employee and worked out of the Dayton Distribution Center; Respondent's only remaining distribution center in Ohio.

Much like her work as an RSD for Respondent, as an "independent contractor, Ms. Krupp can service customers in whichever order she chooses within her given territory. She leases the same handheld computer used by RSDs to settle non-cash accounts. Respondent's employees will directly deliver product to certain accounts in the same manner such deliveries occurred while she was a bargaining unit RSD. (T. 998-99) Respondent pays Ms. Krupp a "margin" at different rates based on the type of product being sold; commissions are also paid to RSDs at different rates for different products. (T. 1036-37)

Contracting for owner-driver equipment

At the hearing the General Counsel, Respondent and Charging Party stipulated to the following: The employer sold a truck to "independent contractor" Lisa Krupp, doing business as BLM Distributing LLC, on September 4, 2016. The employer also sold a truck to Charles

Morris, doing business as Big TMT Enterprize LLC on September 11, 2016. (T. 222-23) The expired collective bargaining agreement at Article XIV, Section 1 provides the following: The Company agrees that it will not employ or contract for owner-driver equipment, and that the Company shall not rent, lease or sub-lease equipment to members of the Union or any other individual, firm, corporation or partnership which has the effect of defeating the terms and provisions of this Agreement. (JX 1) Respondent contracted for the sale of the truck to Ms. Krupp and Mr. Morris. (RX 17)

## III. LEGAL ANALYSIS AND ARGUMENT

### A. Respondent failed in its obligation to bargain in good faith with Charging Party over the decision to sell the four routes.

The Supreme Court has long held that employers are required to bargain with the union over contracting out work when such contracting has the result of effecting economic savings. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964). The Court in Fibreboard noted that reducing costs through workforce reduction and limiting benefits were "peculiarly suitable for resolution within the collective bargaining framework." Id. at 213-14. The Court found the following:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

Id. The Board also recognizes that where the subcontracting decision is not a matter of core entrepreneurial concern and the employer continues the same type of work with different personnel, including independent contractors, decisional bargaining is required. Torrington Industries, 307 NLRB 809 (1992). The Board in Torrington found that Fibreboard is controlling

where the decision "involved unit employees' terms of employment and it did not "lie at the core of entrepreneurial control." Id. at 811.

The Board has continued to apply the Torrington rationale in cases that do not involve physical relocation of unit work. In Mi Pueblo Foods, 360 NLRB 1097 (2014), the company violated 8(a)(1) and (a)(5) by unilaterally implementing route and schedule changes to its driver employees, as well as eliminating pickups of certain products and contracting out that work, resulting in layoffs without affording the union the chance to bargain those changes. The company operated a distribution center where employees loaded and prepared shipments that were subsequently delivered by employee drivers. The company used a contracted carrier to begin delivering products directly to stores, work that had previously been done by the bargaining unit, without bargaining the decision. Id. The Board found there was an "essential continuity in [its] operations," and that bargaining was required by Fibreboard and Torrington. Id.

The facts set forth at trial demonstrate the essential continuity of Respondent's operations through "independent contractors." Respondent is still engaged in the production and delivery of potato chips and related products to its retail customers from its core Dayton distribution center. Respondent requires its contractors to "T-COM" or transfer all "charge/factored invoices to the company, without exception" by 9:00 p.m. each business day and 9:00 p.m. each Saturday. (RX. 16, p. 2; JX 12, p. 2) RSDs also settle accounts on a daily basis. (T. 1013-14) Now, rather than RSDs, "independent contractors" perform essentially the same functions on the routes/territory sold to Ms. Krupp and Mr. Morris as bargaining unit employees performed when they delivered Respondent's products to the same customers in the same area. The "independent contractors" service the same accounts that bargaining unit employees serviced before the routes were sold

with the same exact type of trucks. It was by performing this work as a RSD that one of the contractors, Ms. Krupp, became familiar with the various routes and determined that Routes 104 and 122 were the most desirable. (T. 993-94)

Bargaining unit RSDs are paid a different commission rate on different products Respondent delivers; contractors are paid "margins" at different levels based on the type of product. (T. 1037) Ms. Krupp and Mr. Morris were offered favorable financing for the purchase of trucks from Respondent at 3.0% annually, which caused Mr. Morris and Ms. Krupp to not even seek quotes for alternate financing of their purchase. (T. 644; 960-61)

Respondent's agreements with its "independent contractors" expressly acknowledge that aspect of the relationship: "The Company and the Distributor expressly agree that the relationship between them, created by this Agreement, is that of a seller and independent buyer, and the Distributor shall remain, while this Agreement is in force, an independent contractor…" (RX. 16, p. 4; JX 12, p. 4) Respondent is free for any reason to terminate its "independent contractor" agreements with or without cause with thirty (30) days' written notice to the contractor. (RX 1, p. 5; RX 16, p. 5; JX 12, p. 5) Respondent retains the right to settle disputes between contractors regarding areas of service territory. Respondent requires its contractors to "fully and consistently" adhere to the delivery and merchandise standards prescribed by its customers and by the company from time to time.

Respondent may always negotiate sales prices with certain chain stores, at which point "independent contractors" cannot set higher prices. Respondent also retains the right to "establish other maximum pricing for certain Products, for certain customers and/or certain situations."

Respondent retains ultimate authority over the approval of warehouse space employed by contractors, including in regard to the "sanitary and access conditions" of such facilities. (RX 16, p. 3; JX 12, p. 3) Respondent may, "in the exercise of its sole judgment," increase or reduce the size of, replace or transfer/reassign any retail outlet to another distributor, or otherwise change the Territory." (RX 16, p. 4; JX 12, p. 4) As these provisions make clear, Respondent maintained a substantial degree of control over the methods of distribution and sale of its products through its distributor agreements. These provisions reveal that Respondent is not in fact truly "getting out" of the distribution business, but instead seeks to reduce costs by replacing bargaining unit work by contracting with "independent contractors." By including such provisions in the agreements, Respondent leaves open the possibility it will begin operating these routes again in the future. What has changed from before the four routes at issue were sold is essentially who is delivering the product. Such contracting decisions do not represent a significant change in the scope and direction of the business substantial enough to remove them from the bargaining process.

It is also hardly unheard of for the routes at issue to move back "in-house" to Respondent after the "independent contractors," for various reasons, relinquish them. As early as late 2010, Ohio Citrus "gave up" two routes it had purchased, at least one of which was subsequently run by a bargaining unit member. (RX 2, p. 7) When Buckeye/Keystone filed for bankruptcy, the routes reverted back to Respondent prior to Respondent reaching an agreement with Snyder Lance to service them. (T. 358)

Moreover, the record hardly demonstrates that there is an industry-wide or even a nominal move away from the RSD model. Mr. Kazer's research into the snack industry revealed that he could not name a single firm in addition to Kellogg that had moved away from the RSD

model. (T. 899) Mr. Kazer could not identify a single concrete example of the risk of loss that Respondent maintains is shifted from Respondent to the "independent contractors." (T. 906-07)

**B. Because Respondent retains significant control over the routes it has "sold" and is still engaging in distribution, Respondent's reliance on *First National Maintenance* is misplaced.**

Respondent cites the award of Arbitrator Michael Paolucci in an earlier arbitration as evidence it has not violated the Act. This reliance is misguided for several reasons. At the time of the Paolucci award, Respondent had 80 RSDs and operated from multiple distribution centers in Cincinnati, Columbus, Sabina, Springfield, Greenville, and Dayton, Ohio. (T. 690). While Respondent has eliminated routes in the past, they have always been outside of the Dayton headquarters area. Respondent drew a clear distinction of its own when, in its briefing to arbitrator Paolucci, Respondent referred to the term "outlying" routes. "Outlying" is used to describe a category of routes no fewer than eighteen times throughout the brief, belying any notion that Respondent did not operate with the distinction between these routes and those within their core Dayton service area. (CP EX 1)

The Court in First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981) addressed the termination of an employer's contract with a nursing home and subsequent discharge of bargaining unit employees working at that facility. But that scenario is distinguishable from the matter here for several reasons. The employer in First National did not enter into contracts with other firms to continue serving the nursing home. Moreover the Court expressly limited its decision in noting that the opinion took "no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." Id. at 686, fn. 22. Entering into contracts with individual firms, at least some of which were procured through direct

solicitation of bargaining unit employees, for the same work that would otherwise be performed by RSDs is not "akin to the decision whether to be in business at all." Id. at 677.

As is clear from the history of entering into contracts for distribution, Respondent has not removed itself from the business of distributing its products. It has both reassigned individual routes to bargaining unit employees once they have reverted back from various "independent contractors" and also contracted the routes out again. Respondent has gone between claims that labor costs and profitability were not factors in its decision to "sell" the four routes to intimating that they were central to the decision, or at least provide a justification for the transactions. (T. 539-40; CP EX 1) However, whether Respondent's decision to sell the four routes in question turned on labor costs is not dispositive. Torrington. At the same time, the Union has demonstrated an ability to negotiate proposals favorable to Respondent, for example offering to go from seven (7) to four (4) sick days. (RX 4; T. 941-42)

Respondent continues to engage in distribution both as an everyday component of its business and also when its contractors fail and Respondent receives back the routes. Respondent is only "getting out" of the distribution business when it is not getting further back into distribution. Its contracting scheme up to this point has been marked by bankruptcies and failure, forcing Respondent to find new ways to service its routes. Respondent is aware it cannot enter directly into contracts with its represented employees. Its clear intent was to do the next best thing: if it could set up one or two "independent contractors," even a former RSD with some of its most financially successful routes, perhaps Respondent could demonstrate to other current RSDs that the concept works and convince others to do the same. Respondent bent over backwards to procure financing, overlook insufficient business experience or established income streams in an effort to make the contracting out of these routes successful. But in doing so it

unlawfully cut the Union out of the decisional process, effected unilateral changes without bargaining in good faith and violated the Act.

**C. Respondent's reliance on management rights stemming from an expired collective bargaining agreement is unavailing.**

From the moment it took the position that it would rely on its "inherent management right" to sell the routes at issue without bargaining over the decision with Charging Party, Respondent erroneously relied on an expired contractual provision rather than engage in required bargaining over its proposed contracting. As the Supreme Court has noted,

> "[U]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance."

N.L.R.B. v. Katz, 369 U.S. 736, 747 (1962). The Katz decision was subsequently applied to situations where "an existing agreement has expired and negotiations on a new one have yet to be completed." Litton Financial Printing Div. v. N.L.R.B., 501 U.S. 190, 198 (1991). After expiration of a collective bargaining agreement, the parties are obligated to maintain the status quo for mandatory subjects of bargaining, with limited exceptions, such as arbitration, no-strike/no-lockout, and management-rights waivers. E.I. Du Pont de Nemours, 364 NLRB No. 113 at *4 (2016).

Respondent has accepted this premise, at least insofar as it benefits it with respect to the arbitration clause:

> Q. Was this grievance ever arbitrated?
> A. No.
> Q. Could you tell us why this grievance was not arbitrated?
> A. **It was a contract being expired** and the insinuation of another unfair labor practice charge. We didn't have an arbitration.
> Q. And did the employer tell the Union that they weren't going to arbitrate, if you know?

A. Yes.

(T. 80, emphasis added; T. 98; T. 152) But the Board has also held that management rights clauses do not survive the expiration of a collective bargaining agreement. The management rights provision functions as a "union's waiver of its right to bargain. Once the management rights provision expires, the waiver expires, and the overriding statutory obligation to bargain controls." Beverly Health & Rehabilitation Services, 335 NLRB 635, 636 (2001); Du Pont.

Respondent's case relies heavily on a theory that it is within its discretionary management rights to sell off the routes without regard for bargaining or in some instances even not notifying Charging Party of the sales until after the fact. Respondent's position is at odds with the purposes of collective bargaining and controlling Board law.

Respondent also spent a significant amount of time in its presentation of evidence at the hearing on a theory that Charging Party waived its right to bargain the decision to sell routes. Respondent's theory is not supported by the facts or the prevailing law. The collective bargaining agreement expired on or about November 17, 2012. (JX 1) Respondent closed its distribution centers in Cincinnati, Sabina, and Columbus on November 18, 2012. (T. 691) Respondent entered its "Independent Distributor Agreement" with Keystone Distributing effective November 18, 2012. (RX 5) Counsel for Respondent represented that this document "shows the nature of the relationship between independent distributors as it began[…]" (T. 311) Charging Party is still certainly able to challenge Respondent's unlawful implementation of the route changes.

Waiver is "not lightly inferred" and must be "clear and unmistakable." IMI South, LLC, 364 NLRB No. 97, *3 (Aug. 26, 2016). The burden of proving waiver lies with the party asserting it, who must establish that the parties "unequivocally and specifically express[ed] their

mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." Id.

During the collective bargaining agreement's duration, "any failure to object by the union was in accord with the parties' negotiated agreement and cannot be construed as consent to post-contractual unilateral changes." Du Pont, at *6 (see also, Owens-Corning Fiberglass Corp., 282 NLRB 609 (1987)("a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.").

Even if the Charging Party had not filed previous unfair labor practice charges regarding the sale of outlying routes servicing Columbus, Cincinnati, Sabina, and Springfield areas, it may still contest the failure to bargain over the four routes at issue here. Respondent's consistent reliance on management rights to justify its decision to sell these routes and eliminate bargaining unit work without bargaining fails to acknowledge the impact of the expired management rights clause.

Moreover, Mr. Kazer admitted there were several times when Respondent did not send a letter similar to the April 27, 2016 communication regarding other sales, namely the Springfield and Greenville territories. (T. 751; 762) Several instances where Respondent provided no notice whatsoever to Charging Party were held up as examples of acquiescence in Respondent's actions through waiver. These arguments should be rejected.

**D. Respondent failed to provide relevant information to Charging Party essential to its function as bargaining representative.**

An employer's failure to provide a union with requested information relevant to the union's performance of collective bargaining duties violates 8(a)(5). Boeing Co., 363 NLRB No. 63 (2015), citing Leland Stanford Junior University & Service Employees Local No. 715, SEIU, 262 NLRB 136, 138, 110 LRRM 1275 (1982); ADT, Inc., 363 NLRB No. 36 (2015). The

relevance of requested information "is ascertained by analyzing the information request against a liberal 'discovery' standard of relevance as distinguished from the standard of relevance in trial proceedings." Id. It is well settled that information relating to wages, hours, and other terms and conditions of employment for unit employees is "presumptively relevant to the union's role as exclusive collective-bargaining representative." Id.

Respondent's argument is premised on its misconception that it was not required to bargain over the "route sales" at issue. But these decisions directly affected the terms and conditions of employment within the bargaining unit. The routes no longer performed by unit employees were some of the most profitable at the company. Respondent experienced none of the increased transportation costs associated with its other former distribution centers because the four routes at issue operated out of the Dayton Distribution Center, which eliminates the transportation costs associated with the other distribution centers. Ms. Krupp was well aware of the possibility of finding herself in a similar situation to when Respondent eliminated the Springfield territory and contracted for the continued distribution of its products; she was low in seniority and had to make a decision. Ms. Krupp had personal knowledge of Routes 104 and 122; she had run those routes with some of the very employees who would be displaced and lose commissions as a result of Respondent's actions.

The replies Respondent's counsel sent in late 2016 relate to entirely separate issues litigated in the Board's decision in Mike-Sells' Potato Chip Co., 360 NLRB No. 28 (2014), aff'd Mike-Sell's Potato Chip Co. v. N.L.R.B., 807 F.3d 318 (D.C. Cir. 2015) and have no bearing on this case. While discussions of settlement relative to that case continued, Respondent admitted in its September 12, 2016 letter to Mr. Weeks that it would not be complying with the information request in this case. (JX 9) Respondent Exhibit 42, for instance, makes no reference to Charging

Party's August letter requesting information relative to the elimination of the four routes in 2016. The fact remains that Respondent has not provided the information necessary for the Union to be able to bargain Respondent's decision to sell the four routes in question and Respondent's unlawful changes in contracting out bargaining unit work and changing the manner in which Respondent services its customers on the four routes sold in 2016.

## IV. CONCLUSION

Based on the foregoing arguments, citations of authority and the record as a whole, Local 957 submits that Counsel for the General Counsel clearly satisfied its burden of proof and established that Respondent violated the Act when it refused to bargain the decision to sell the four routes at issue in 2016 and also failed to provide requested relevant and necessary information to Charging Party relative to those sales. Respondent's products continue to be distributed through alleged "independent contractor" agreements with entities that perform essentially the same work under essentially the same conditions that bargaining unit members previously performed. Respondent made these decisions without the benefit of a valid management rights provision and without meeting its duty to bargain in good faith over the contracting, a mandatory subject of bargaining impacting the wages, hours and terms and conditions of employment of bargaining unit members. Charging Party respectfully requests that the Administrative Law Judge find that Respondent has violated Sections 8(a)(1) and (a)(5) as alleged in the complaint and amended complaint and fashion an appropriate remedy in this case.

## PROPOSED FINDINGS OF FACT

1. Respondent is a corporation with an office and place of business in Dayton, Ohio, and has been engaged in the operation of a warehouse and distribution facility for the production of chips and other snack foods. Annually, Respondent in conducting the

business operations described purchased and received at its Dayton, Ohio facility goods valued in excess of $50,000 directly from points located outside the State of Ohio.

2. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about August 29, 2016, Charging Party sent a letter to Respondent requesting:

> 1. All documents that demonstrate the profitability of all of the Company's routes for the period from September 1, 2014 through August 1, 2016 so a comparison can be made as to the profitability of all of the routes to Route No. 104 and Route No. 122.
> 2. A copy of the agreement between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold.
> 3. A description of how Mike-Sell's product is to be received by the entity to whom route No. 104 and Route No. 122 is scheduled to be sold.
> 4. A copy of all correspondence, including electronic correspondence, between Mike-Sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold from the date of the first such correspondence until August 29, 2016.

4. On or about September 12, 2016, Respondent sent Charging Party a response indicating it would not provide said information.

5. On or about July 11, 2016, Respondent sold its Route # 102. Since on or about July 11, 2016, Respondent has failed and refused to bargain collectively about the sale of Route # 102.

6. Respondent engaged in the sale of Route # 102 without affording the Union an opportunity to bargain with Respondent with respect to the sale and/or without first bargaining with the Union to an overall good-faith impasse for a successor collective bargaining agreement.

7. The sale of Route # 102 relates to wages, hours, and other terms and conditions of employment of the bargaining unit and is a mandatory subject for purposes of collective bargaining.

8. On or about August 29, 2016, Respondent sold its Route # 104 and # 122. Since about September 12, 2016, Respondent has failed and refused to bargain collectively about the sale of Routes # 104 and 122.

9. The sale of Routes # 104 and 122 relates to wages, hours, and other terms and conditions of employment of the bargaining unit and is a mandatory subject for purposes of collective bargaining.

10. Respondent engaged in the sale of Routes # 104 and 122 without affording the Union an opportunity to bargain with Respondent with respect to this conduct and/or without first bargaining with the Union to an overall good-faith impasse for a successor collective bargaining agreement.

11. On or about September 12, 2016, Respondent sold its Route # 131. About September 12, 2016, the Union has requested that Respondent bargain collectively about the sale of Route # 131.

12. Respondent has failed and refused to bargain collectively about the sale of Route # 131. The sale of Route # 131 relates to wages, hours, and other terms and conditions of employment and is a mandatory subject for purposes of collective bargaining.

## PROPOSED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The International Brotherhood of Teamsters, Local Union No. 957 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated the Act by failing to bargain in good faith over mandatory subjects of bargaining in violation of Section 8(a)(1) and (a)(5) of the Act.

4. Respondent has violated the Act by unilaterally eliminating bargaining unit positions without meeting and negotiating with the Union over the decision to do so in violation of Section 8(a)(1) and (a)(5) of the Act.

5. Respondent has violated the Act by failing to provide relevant information for the Union to perform its function as bargaining representative for unit employees in violation of Section 8(a)(5) of the Act.

Respectfully submitted,

**DOLL, JANSEN & FORD**

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Motion for an Extension of Time to File Post Hearing Briefs was served upon Counsel for the Respondent, Jennifer Asbrock, (jasbrock@fbtlaw.com), Counsel for the General Counsel, Linda Finch, Esq. (linda.finch@nlrb.gov) by electronic mail on this 7th day of July, 2017.

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